

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

77-2022

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-2022

THOMAS JOSEPH HERRMANN,

Appellant

-VS-

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

JOINT APPENDIX

Stephen Wizner
Dennis E. Curtis
Mary F. Keller
Judith M. Mears
127 Wall Street
New Haven, Connecticut 06520

Attorneys for Appellant

B
P/S



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CRIMINAL POCKET
UNITED STATES DISTRICT COURT

BEST COPY AVAILABLE

12860

D. C. Form No. 100 Rev.

TITLE OF CASE		ATTORNEYS
THE UNITED STATES		For U. S.:
vs.		Stewart W. Jones, U.S. Attorney
THOMAS JOSEPH HERRMAN		Peter A. Clark, Asst. USA
and		Federal Building
GEORGE BEVERLEY BUCHANAN		New Haven, Conn.
		For Defendant:
BUCHANAN: Alphonse C. Jachimczyk		41 Park St., Stamford, Ct. 0690
HERRMAN: Alan Neigher		E. Eugene Sp
855 Main Street		22 Prospect St.
Suite 825		1115 Main St
Bridgeport, Conn. 06604		Bridgeport,

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISC.
J.S. 2 mailed	Clerk	1974 10/31	A. Neigher (Appeal)	5 00	
J.S. 3 mailed	Marshal	10/31	Deposit: G. F. 100869		5 00
Violation U.S. CODE	Docket fee				
Title 18					
Sec. 2113(a); 2113(b) and 2113(d)					

DATE	PROCEEDINGS
1970 10/29	The Grand Jury at New Haven returned a True Bill of Indictment charging violation of 18 USC 2113(a)-ct. 1-taking by force from another, money belonging to bank insured by FDIC; 2113(b)-ct. 2-taking with intent to steal and carrying away, money in excess of \$100 belonging to and in care of bank insured by FDIC; 2113(d)-ct. 3-in committing acts alleged in Cts. 1 & 2- putting in jeopardy life of another by use of a dangerous weapon. Both defendants are presently incarcerated. U.S. Commissioner's bond of \$50,000.00 with surety for each defendant may continue. (Zampano, J.) m-10/30/70.
8/27	Commissioner's papers filed re: Def. BUCHANAN. Record of proceedings; Warrant of Arrest; Complaint; and Affidavit of Edwin W. Buffum.
10/9	Appearance of Alphonse C. Jachimczyk entered for Def. Buchanan.
8/27	Commissioner's papers filed re: Def. HERRMAN. Record of proceedings; Warrant of Arrest; Complaint; Affidavit of Edwin Buffum.
9/2	Commissioner's paper filed re: Def. HERRMAN. Warrant of Arrest with Return Complaint, Affidavit of Edwin Buffum and Temporary Commitment.
9/18	Record of Proceedings before U.S. Commissioner, filed. Re: Def. Herrmann.
10/9	Appearance of Thomas Joseph Herrmann entered for Def. Herrman for purpose of Bail Reduction Hearing only.
10/9	Motion For Reduction of Bail filed by Def. Thomas Joseph Herrmann.

PROCEEDINGS

DATE	
1970	
11/9	Commissioner's papers filed.- Record of proceedings; Warrant of Arrest; Complaint Affidavit of Edwin W. Buffum and Temporary Commitment.
11/12	Herrman: Motion For Reduction of Bail filed by defendant. Noticed for hearing, 11/23/70 at New Haven.
11/9	Buchanan: PLEA of not guilty entered to Counts 1,2 and 3. Case continued on said bond for trial. Ten days allowed for motions. (Zampano, J.) m-11/12/70.
11/9	Herrmann: PLEA of not guilty entered to Counts 1,2, and 3. Case continued on said bond for trial. Ten days allowed for motions. (Zampano, J.) m-11/12/1970.
11/23	Defendant Herrmann's Motion For Reduction of Bail-CONTINUED to next criminal motion calendar. (Zampano, J.) m-11/24/70.
12/10	Report of proceedings before U.S. Commissioner, filed re: Def. Herrmann.
1971	
1/15	Motion to Withdraw as Attorney filed by James F. Bingham. Motion For Reduction of Bail, filed by defendant. Noticed for hearing 1/25/1971.
1/15	Court Reporter's Sound Recording of proceedings held on November 9, 1970, filed. Both Defendants-Plea (Russell, R.)
1/25	Government's Response to Defendant Thomas Herrmann's Motion For Reduction of Bail, filed.
1/25	Defendant Herrman's Motion For Reduction of Bail and Motion of James F. Bingham to withdraw as Attorney for Defendant Herrman TRANSFERRED to Judge Timbers Calendar (Zampano, J.) m-1/26/71.
1/22	Court Reporter's Notes of proceedings held on November 9, 1970, filed. Pleas-Both Defendants (Russell, R.)
1/25	Court Reporter's Notes of proceedings held on November 23, 1970, filed. (Russell, R.)
1/25	Court Reporter's Notes of proceedings held on December 21, 1970, filed. Motion OFF Both Defendants (Russell, R.)
1/26	Endorsement entered on Attorney's Motion to Withdraw: "1/25/71. Over to Judge Timbers next criminal calendar." (Zampano, J.) m-1/27/71. Endorsement entered on Defendant Herrmann's Motion For Reduction of Bail: "1/25/71. OVER to Judge Timbers' next criminal motion calendar." (Zampano, J.) m-1/27/71. Copies of endorsements sent to Attn. Jones and Jachimezyk and Bingham.
2/3	Motion for Reduction of Bail, filed by defendant Herrmann.
2/24	Following endorsement on defendant HERRMAN'S Motion for Reduction of Bail: "Motion continued to 3/8/71 per agreement of counsel." Timbers, J. m-2/24/71. Copies mailed to counsel.
2/24	Following endorsement on defendant HERRMAN'S Motion to Withdraw as Attorney: "Motion continued to 3/8/71 per agreement of counsel." Timbers, J. m-2/24/71. Copies mailed to counsel.
3/8	Hearing held on (1) Defendant's (Herrman) Motion for Reduction of Bail. Motion continued to 3/22/71 upon condition that it be determined on the merits on said date without bail. Motion endorsed accordingly and copies mailed to counsel and defendant; and (2) Motion of James F. Bingham to Withdraw as Attorney for Defendant Herrman. Motion granted; provided that counsel notify defendant forthwith in writing to retain new counsel or to apply immediately for the appointment of counsel. Motion endorsed accordingly and copies mailed to counsel and defendant. Latimer, M. m-3/8/71.
3/22	Notice of Reduction of Bail, filed by defendant pro se.
3/22	HERRMAN: Hearing held on Defendant's Motion for Reduction of Bail. Motion off, for failure to prosecute. Latimer, Magistrate. m-3/22/71.
3/23	Following endorsement on Defendant's (HERRMAN) Motion for Reduction of Bail. Motion off, failure to prosecute. Latimer, Magistrate. m-3/23/71. Copies mailed to U. S. Atty and defendant.
3/29	CJA Form 1 appointing E. Eugene Spear, Esq., as court appointed counsel, filed. (Saden, U.S. Magistrate) (contd)

DATE 1971	PROCEEDINGS
3/29	CJA Form 1 appointing E. Eugene Spear, Esq., as court appointed counsel, filed by U.S. Magistrate George A. Saden.
4/5	Notice of Motion for Reduction of Bail, filed. (Noticed for 5/12/71)
4/6	Following endorsement on defendant HERRMANN'S Notice for Reduction of Bail: Motion continued at the request of court-appointed counsel for defendant, and marked over to Judge Clarie's next criminal calendar. Latimer, M. m-4/6/71. Copies mailed to counsel and defendant.
4/5	Hearing held on Defendant's (Herrman) Motion for Reduction of Bail. Eugene Spear, Esq., appointed as counsel for Herrmann. Motion over to 4/12/71. Latimer, M. m-4/5/71
4/19	Hearing held on Defendant's (HERRMAN) Motion for Reduction of Bail, Motion denied. Claire, J. m-4/20/71.
4/20	On TEC's Jury Assignment List. Set for trial on May 11, 1971, at Hartford. Claire, J. m-4/21/71.
5/11	BUCHANAN: CHANGE OF PLEA - Defendant requests leave of court to change his plea of not guilty. Court grants request. Defendant pleads guilty to Count 1. Case continued on same bond for sentencing. Zampano, J. m-5/13/71.
5/13	HERMAN: Change of Plea - Defendant requests leave of court to change his plea of not guilty. Court grants request. Defendant pleads guilty to Count 1. Case continued on same bond for sentencing. Remaining counts to be dismissed at time of sentencing. Claire, J. m-5/14/71.
5/14	HERRMAN: Appearance Bond in the amount of \$50,000.00 (personal recognizance), filed. Approved: Claire, J. m-5/14/71.
6/23	Court Reporter's notes of proceedings held on May 13, 1971, filed at Hartford, (Sperber, R.).
7/2	Court Reporter's Notes of proceedings held on April 19, 1971, filed at Hartford. (Sperber, R.) Deft.-Herrmann
7/26	DISPOSITION: Buchanan- 11 years imprisonment on Count 1. After 10 days government will dismiss Counts 2 and 3. (Zampano, J.) m-7/27/71.
7/27	BUCHANAN: Judgment and Commitment, filed and entered. Zampano, J. m-7/27/71. True attest copies handed to U. S. Marshal at New Haven.
7/30	HERMANN: DISPOSITION - Continued to first criminal day in September. Claire, J. m-8/2/71.
8/2	BUCHANAN: Marshal's return showing service, filed. Judgment and Commitment at Newbury, Pa.
8/11	Motion to Dismiss Counts 2 and 3 of Indictment with Order granting same thereon filed and entered. (Zampano, J.) m-8/11/71. BUCHANAN.
9/16	Order Denying Motion to Reduce Sentence, filed and entered. Ordered that defendant's motion for reduction of sentence be, and the same hereby is, denied. Zampano, J. m-9/17/71. Copies mailed to counsel and defendant. BUCHANAN.
9/15	Court Reporter's Notes of proceedings held on July 26, 1971, filed at Hartford. Disposition-Buchanan (Russell, R.)
9/27	HERMANN: DISPOSITION - Imprisonment for eleven (11) years. Sentence to run consecutive to present State sentence now being served. Counts 2 and 3 dismissed, Order filed. Claire, J. m-9/28/71.
9/29	Judgment and Commitment filed and entered. (Claire, J.) m-9/30/71. Copies handed U.S. Marshal for service. Def. HERMANN.
9/27	Motion to Dismiss Counts 2 and 3, filed with Order thereon granting same filed and entered. (Claire, J.) m-9/30/71.
10/8	Court Reporter's Notes of proceedings held on July 30, 1971, filed at Hartford. Continued (Mahoney, R.) Deft.-Herrmann
10/13	Court Reporter's Sound Recording of proceedings held on September 27, 1971, filed at Hartford. Disposition Def.-Herrmann (Sperber, R.)
10/8	Court Reporter's Notes of proceedings held on September 27, 1971, filed at Hartford. Disposition Def.-Herrmann (Sperber, R.)

DATE 1971	PROCEEDINGS
11/17	HERRMAN: Notice of Motion and Motion for Modification of Sentence, filed, by defendant. (Noticed for 12/13/71 at Hartford)
12/20	Hearing held on Def. Herrman's Motion For Modification of Sentence. DENIED. (Clarie, J.) m-12/21/71.
12/20	Endorsement entered on Def. Herrman's Motion For Modification of Sentence: "Dec. 20, 1971. Motion for modification of sentence denied." Clarie, J. m-12/21/71. Copies mailed Attys. Jones and Spear.
1972 1/17	Order Denying Motion to Reduce Sentence, entered and filed. Re: George B. Buchanan. Copies of order mailed Attorneys Jones, Jachimezyk and defendant.
1/26	Court Reporter's Sound Recording of proceedings held on July 26, 1971, filed. Deft.-Buchanan Disposition (Russell, R.)
3/9	HERRMAN: CJA Form 4 executed, approved by the Court (Clarie, J) and mailed to A.O. for payment.
1973 1/31	BUCHANAN: Motion for Sentence Modification Pursuant to Rule 35, F.R.Crim.P., filed by defendant.
2/6	BUCHANAN: Order Denying Motion to Reduce Sentence, filed and entered. Zampar J. m-2/7/73. Copies mailed to counsel and petitioner.
3/1	BUCHANAN: Motion for Sentence Modification Pursuant to Rule 35 and Rule 36 of FRCrimP., filed by defendant.
3/15	BUCHANAN: Puling on Petition for Reconsideration of Order Denying Sentence Modification, filed and entered. Ordered that petitioner's motion for modification be and the same hereby is again denied. Zampano, J. m-3/15/73. Copies mailed to counsel and petitioner.
1974 9/3	HERRMANN: Motion for Suspension of Sentence and Probation, Or For Modification of Sentence And/Or Other Relief and Preliminary Memorandum in Support Thereof, filed by the defendant.
9/9	HERRMANN: Defendant's Motion for Suspension of Sentence and Probation, or for Modification of Sentence and/or Other Relief on TEC's Misc. Calendar. Marked off. Clarie, J. m-9/10/74.
9/11	HERRMANN: Court Reporter's Transcript of proceedings held Sept. 27, 1971, filed. Sperber, R.
9/17	HERRMAN: Court Reporter's Transcript of proceedings held on December 20, 1971, (Motion for Modification of Sentence), filed. (Collard, R.)
10/15	HERRMAN: Defendant's Motion for Suspension of Sentence and Probation, or for Modification of Sentence and/or Other Relief, denied in accordance with Rule 35. Clarie, J. m-10/17/74.
10/18	HERRMAN: Following endorsement on defendant's Motion for Permission to Examine Presentence Report: "Motion for permission to examine pre-sentence report at the Federal Probation Office is granted. So Ordered. Clarie, J. m-10/17/74. Copies mailed to counsel and to Probation Office at Hartford.
10/25	HERRMANN: Notice of Appeal from order entered Oct. 15, 1974, filed by defendant. Copies mailed to counsel. Certified copy of Notice of Appeal and docket entries mailed to U.S. Court of Appeals.
10/29	HERRMANN: Memorandum in Support of Motion to Vacate and Correct Sentence, filed by defendant.
"	HERRMANN: Motion to Vacate and Correct Sentence, filed by defendant.
10/30	HERRMANN: Correction in Memorandum in Support of Motion to Vacate and Correct Sentence, filed by defendant.
10/31	HERRMANN: Endorsement as follows on defendant's Motion for Suspension of Sentence and Probation, Or For Modification of Sentence

(continued)

DATE	PROCEEDINGS
1974	
	And/Or Other Relief: "The defendant's motion for suspension of sentence, probation, or modification of sentence, is denied pursuant to Rule 35, Fed. R. Crim. P. SO ORDERED."
	Clarie, J. m- Copies mailed to counsel.
11/13	Record on Appeal sent U.S. Court of Appeals. Copies of the sent Attys. Dorsey, Neigher and Spear.
11/18	Receipt of Record on Appeal received from the U.S. Court of App.
11/15	Court Reporter's Notes of proceedings held on Oct. 15, (Motion), filed at Hartford. Sperber, R. (Deft. Herrmann)
11/25	On TEC's Miscellaneous Calendar: Motion to Vacate and Correct Sentence, continued to Dec. 2, 1974. Clarie, J. m-11/2
11/26	HERRMAN: Motion to Enlarge the Time for Docketing the appeal, filed.
11/27	HERRMAN: Hearing on Motion to Vacate and Correct Sentence over to Dec. 9, 1974, at 10:00 A.M. Clarie, J. m-11/27/74.
12/2	HERRMAN: Petition for Writ of Habeas Corpus Ad Testifi filed and approved. Clarie, J. m-12/2/74
12/2	HERRMAN: Following endorsement on Defendant's Motion to Enlarge the Time for Docketing the Appeal, "Continued to December 1974 by consent of counsel." Clarie, J. m-12/3/74. Copies ma to counsel.
12/9	HERRMAN: Hearing on Motion to vacate and To Correct Sen "Decision Reserved." Defendant sworn and testified, 1 Defenda ness sworn and testified. Clarie, J. m-12/10/74
12/12	Marshal's return showing service, filed: Writ of Habeas C (Herrman).
1975	
1/3	HERRMAN: Ruling on Motion To Vacate and Correct Sentence and entered. "The petitioner's motion to vacate and correct s is accordingly denied. SO ORDERED." Clarie, J. m-1/6/74 con mailed to counsel of record.
1/3	Court Reporter's Notes of Proceedings held on Dec. 9, 19 (Criminal Motions). Filed Sperber, R.
1/9	Marshal's return showing service, filed. Judgment and Co Defendant (HERMANN) committed to C.C.I. at Somers, Connecticut
1/13	HERMANN: Notice of Appeal, filed by defendant. Copies ma to Counsel.
1/14	HERMANN: Certified copies of docket sheets and Notice of sent to U.S.C.A.

DATE	NR.	PROCEEDINGS
1976		
9-8	1.	Motion to Proceed in forma pauperis filed.
	2	Motion to Vacate Conviction.
	3	Memorandum in support of motion to vacate conviction.
	4	ORDER TO SHOW CAUSE Why Motion to Vacate Judgment Should Not Be Granted., Clarie J m 9-10-76. Petition may be filed without payment of filing fee. Attested copies of OSC and copies of petition, and motions handed to Marshal for service.
9-17	5	Marshal's return showing service by certified mail.
10-1	6	Government's Response to Order to Show Cause Why Motion to Vacate Judgment Should Not Be Granted.
10-4	7	Request for one-day extension to respond to Complaint. End. - "Request granted." 10/4/76. Clarie, J. m10-4-76. Copies mailed to counsel.
11-15	8	Petition for Writ of Habeas Corpus Ad Testificandum and ORDER, Clarie, J. m11-15. Two attested copies of order and copies of writ handed to Marshal for service. (Hearing on 11/22/76)
11-22		HEARING on the Merits. Motion that Peter Levine appear. Motion granted. Motion to Amend Motion to Vacate Conviction filed. Petitioner sworn and testified. One petitioners witness sworn and testified. Brief to be filed by Petitioners Atty in one week. Govt. to respond in one week thereafter. Petitioner Herrmann requests that bond be set. Motion denied. Dec. Reserved pending filing of brief.
11-26	9	Return Writ of Habeas Corpus Ad Testificandum served on 11-22-76.
12/1	10	Petitioner's Supplementary Memorandum of Law.
12-14	11	Government's Supplemental Response filed.
1977		
1-20	12	Ruling on Motion to Vacate Judgment, Clarie, J. m 1-21-77. Copies mailed. (denie
1-25	13	JUDGMENT entered. Markowski, C. m 1-26-77. Copies mailed.
2-9		Court Reporter's notes of proceedings held on Nov. 22, 1976 filed in Hartford, Sperber, R.
2-10	14	Notice of Appeal filed. "Filing Fee is waived." Clarie, J. m 2-10-77. Copies of notice mailed to counsel, Civil Management Form mailed to Atty Wizner. Attested copies of notice and docket entries mailed to U.S. Court of Appeals and New Haven.

1 True Copy
ATTEST:

WILVESTER A. MARKOWSKI
Clerk, U. S. District Court

By: *Ann M. Shaw*
Deputy Clerk

INDEX TO RECORD ON APPEAL

DOCUMENT NO.

VOLUME I

Court Reporter's Transcript of proceedings of November 22,
1976 1

VOLUME II

Copy of Docket Entries A

Motion to Proceed in Forma Pauperis, Affidavit of Thomas Herrmann
attached 2

Motion to Vacate Conviction 3

Order to Show Cause Why Motion to Vacate Judgment Should Not
Be Granted 4

Government's Response to Order to Show Cause Why Motion to Vacate
Judgment Should Not Be Granted (Copy of transcript of
disposition attached) 5

Writ of Habeas Corpus Ad Testificandum 6

Petition for Writ of Habeas Corpus Ad Testificandum 7

Motion to Amend Motion to Vacate Conviction 8

Affidavit of Eugene Spear 9

Ruling on Motion to Vacate Judgment 10

Judgment 11

Notice of Appeal with Order thereon 12

Clerk's Certificate 13

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF CONNECTICUT
3 * * * * *
4 THOMAS JOSEPH HERRMANN * CIVIL ACTION
5 vs. * NO. H-76-361
6 UNITED STATES OF AMERICA * NOVEMBER 22, 1976
7 * * * * *

8 Before: HON. T. EMMET CLARIE, CHIEF JUDGE
9
10
11

12 A p p e a r a n c e s:

13 For the Petitioner:
14 STEPHEN WIZNER, ESQ.
15 Legal Services Organization
16 127 Wall Street
17 New Haven, Connecticut 06520
18
19 PETER LAVIGNE
20 Law Student Intern

21 For the Respondent:
22 PETER A. CLARK, ESQ.
23 Assistant U.S. Attorney
24 P.O. Box 1824
25 New Haven, Connecticut 06508

Elliott Sperber
Official Court Reporter
District of Connecticut

1 THE COURT: Civil H-76-361. Thomas Joseph
2 Herrmann versus United States of America.

3 MR. WIZNER: May it please the Court, my name
4 is Stephen Wizner. I represent the petitioner,
5 Thomas Joseph Herrmann.

6 There is on file with the Court an application
7 pursuant to Local Rule 26, for permission for
8 Peter Lavigne, a law student at the Yale Law
9 School, to appear in these proceedings.

10 And I ask at this time that the Court approve
11 that application.

12 THE COURT: Any objection, Counselor?

13 MR. CLARK: None, your Honor.

14 MR. WIZNER: I have one more preliminary
15 matter, your Honor.

16 THE COURT: That motion is granted.

17 MR. WIZNER: Thank you very much, your Honor.

18 In reviewing the papers of Mr. Lavigne
19 yesterday, I noticed that it appeared to me that
20 there was a less drastic alternative that we could
21 request by way of relief.

22 As your Honor will recognize, as you will see
23 in the pleadings now, we have requested that his
24 plea of guilty be vacated, and that he be allowed
25 to plea anew. I would like at this time, and I

1 understand there is no objection from the
2 Government, to file a small amendment, which asks
3 as an alternative relief that the sentence be
4 vacated, and that he be resentenced, rather than
5 the whole guilty plea be vacated, as an alternative
6 item of relief.

7 THE COURT: Any objection?

8 MR. CLARK: I have no objection to allowing
9 counsel to file that. I have some reservations
10 as to whether the Court is empowered to do that.

11 THE COURT: That may be filed.

12 MR. WIZNER: Thank you very much, your Honor.

13 THE COURT: Has counsel reviewed your
14 petitioner's probation report?

15 MR. WIZNER: I have not, your Honor.

16 THE COURT: The probation officer hasn't given
17 you his report? I will give you mine.

18 In other words, you haven't had available to
19 you his probation report at any time?

20 MR. WIZNER: No, I have not, your Honor.

21 THE COURT: It might be helpful, so that you
22 will know what the background of your client is.

23 MR. WIZNER: If your Honor would permit me to
24 see it, I would be delighted to look at it.

25 THE COURT: The recommendation of the Probation

1 Officer is not included. That is customarily
2 not included in that.

3 MR. WIZNER: I understand that, your Honor.

4 THE COURT: You will notice up in the right-
5 hand corner is my writing, "11 years." I
6 originally had 12 to 15, and you will notice I
7 changed it to 11, after hearing the case.

8 MR. WIZNER: That appears on the sentencing
9 transcript, your Honor.

10 THE COURT: I think I told him that.

11 MR. WIZNER: That's right. You stated your
12 reasons. You said at that time that you wanted him
13 to receive the same sentence that Judge Zampano
14 had given to the co-defendant.

15 THE COURT: For the same crime.

16 MR. WIZNER: Yes.

17 THE COURT: As I recall, your client is the
18 man who had the gun?

19 MR. WIZNER: That's right. You stated at that
20 time that it was your intention that he receive the
21 same sentence as the co-defendant.

22 That is actually the gravamen of our pleading
23 today; that he ended up not receiving the same
24 sentence.

25 THE COURT: He was already serving a sentence

1 in the state, and you are asking to give him a
2 discount, two crimes for the price of one; is that
3 it?

4 MR. WIZNER: Perhaps if we have Mr. Herrmann
5 and his attorney testify, then we can discuss
6 with your Honor what mercy we are seeking from the
7 Court.

8 THE COURT: Very well.

9 MR. WIZNER: Thank you very much.

10 MR. LAVIGNE: Your Honor, my name is Peter
11 Lavigne. I appreciate the opportunity to appear
12 here before you.

13 Your Honor, we have three issues to bring
14 before the Court. The first of these is a Rule 11
15 issue. In two cases, United States versus Meyers,
16 a 1972 case in the Ninth Circuit, and Love versus
17 United States, a 1975 case in the Eastern District
18 of North Carolina, it has been held that the impact
19 of 18 U.S.C., Section 3568, that the Court is
20 powerless to direct a federal sentence to run
21 concurrently with a previously imposed state
22 sentence, where the direct consequence of the
23 plea of guilty requires that the Court determine
24 the defendant's understanding of these consequences,
25 before accepting the defendant's plea of guilty.

1 This case is made difficult, of course,
2 because of the fact that the Court didn't know
3 until moments after it accepted the plea of guilt
4 that the defendant would request a change of
5 custody to the State Court.

6 However, we are going to show in a few moments
7 that the petitioner, his attorney, and the
8 prosecutor, all made a mistake, which took the
9 petitioner from a condition in which he was
10 certain of concurrent service as a state and
11 federal sentence, to a situation where he was
12 ineligible for concurrent sentence of the state
13 and federal sentence, and that the judge was the
14 last person at that time who had the power to
15 correct this mistake. We believe that the judge
16 at that time should have.

17 The second issue is that there was an
18 agreement made with the prosecutor before the
19 plea of guilty.

20 THE COURT: Who was the prosecutor with whom
21 the agreement was made?

22 MR. LAVIGNE: Peter Clark.

23 MR. CLARK: I prosecuted that case, your Honor,
24 Peter Clark.

25 MR. LAVIGNE: And we will be providing

1 testimony by Mr. Herrmann and Mr. Spear as to
2 exactly what the agreement was.

3 Basically we are not saying that the
4 prosecutor promised that there would be concurrent
5 sentencing, but he did promise two things: first,
6 that he would not object to the transfer of the
7 defendant from federal into state custody
8 immediately after his plea of guilty; and second,
9 that he would not object to concurrent sentences
10 by the judge.

11 These two agreements were based on belief by
12 the prosecutor, the defendant's attorney and the
13 defendant, that the very act of transferring the
14 defendant into state custody would make the
15 defendant eligible for concurrent sentencing.

16 This did not happen. In fact, the very
17 opposite happened. The defendant went from a
18 situation where, like his co-defendant, he would
19 have served concurrent sentences, he went --

20 THE COURT: Couldn't the Court have said, if
21 it wanted a concurrent sentence to be effective,
22 recommended to the Attorney General that this
23 defendant serve his federal sentence at Somers
24 State Prison, where he is presently serving a state
25 sentence? And that in effect would have amounted

1 to a concurrent sentence. Couldn't that be done?

2 MR. LAVIGNE: Yes, your Honor. The Court
3 could have made that recommendation. However, in
4 both Meyers and Love, it was agreed that although
5 the Court had power to recommend, it did not have
6 the power to direct concurrent sentencing.

7 THE COURT: As a practical matter, although
8 the Court can't actually enforce a concurrent
9 sentence, as a practical matter, isn't that the
10 custom which is prevailing now, and was prevailing
11 then in our federal system; that if a judge
12 recommended that the sentence be served at the
13 state institution, it was tantamount to a
14 concurrent sentence?

15 MR. LAVIGNE: That's true, your Honor. I
16 would like to read to you the words from Meyers:
17 "The most the District Judge could have done was
18 to have recommended to the prison authorities that
19 a federal sentence be made concurrent with or
20 consecutive to state confinement. Prison
21 authorities need not and do not always follow such
22 recommendations."

23 THE COURT: All right.

24 MR. LAVIGNE: Our claim then is that there
25 was an agreement, and that the basis of the

1 agreement was a mistaken belief that as a result
2 of defendant's plea of guilty he was to be put
3 into a situation in which he would be more likely
4 to receive concurrent sentences.

5 THE COURT: Now, this belief is on the part of
6 whom, the defendant?

7 MR. LAVIGNE: The defendant and the
8 defendant's --

9 THE COURT: Certainly not upon the part of the
10 Court. The Court had no intention of giving him a
11 discount. It made it very clear.

12 MR. LAVIGNE: It wasn't the intention on the
13 part of the Court, I might add, however -- the only
14 intention stated by the Court, on two separate
15 occasions, the disposition, and later, at the
16 Rule 35 hearing, was that the defendant be given
17 the same sentence as the co-defendant, and that he
18 be treated equally.

19 THE COURT: For the same crime.

20 MR. LAVIGNE: Yes, your Honor. That wasn't
21 specified in the transcript.

22 THE COURT: Isn't that what happened to him?
23 The same 11 years? The Court was going to give him
24 12 to 15, and because Judge Zampano had given 11,
25 and it seemed, considering the fact that he had the

1 state sentence hanging over his head, and considering
2 his past record -- I guess you haven't seen that;
3 I gave it to your associate just now.

4 MR. LAVIGNE: I have seen it.

5 THE COURT: Considering all of the factors
6 there, that 11 years would be most charitable for
7 the Court to give this client.

8 But, you proceed.

9 MR. LAVIGNE: Your Honor, on that matter, I
10 would like to point out that if the defendant had
11 been given a 15 year sentence, concurrent with his
12 state sentence, he still would have been out a year
13 and a half ago.

14 The fact that he received consecutive
15 sentences, while his co-defendant received
16 concurrent sentences, meant that his co-defendant
17 was out on parole a year and a half ago.

18 THE COURT: Did his co-defendant have a term
19 to serve in the state institution?

20 MR. LAVIGNE: Yes, he did.

21 THE COURT: What was his sentence?

22 MR. LAVIGNE: I believe it was -- I'm not sure,
23 your Honor. I believe something like a three year
24 sentence.

25 THE COURT: Your client had what, a five to

1 seven?

2 MR. LAVIGNE: Five to seven. I will be able
3 to bring that out on examination.

4 THE COURT: All right.

5 MR. LAVIGNE: Finally, the third issue is that
6 there was a mistake all around on the part of the
7 defendant, the defendant's attorney, and the
8 prosecutor. And we are asking for relief by the
9 Court, in the form of a correction of sentence,
10 and resentencing, so that the Court's intention
11 that the defendant should be treated equally with
12 his co-defendant can be carried out.

13 If I may then I would like to go to the
14 examination.

15 THE COURT: Certainly.
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1 T H O M A S J . H E R R M A N N , appearing
2 as a witness, being duly sworn, testified as follows:

3 THE CLERK: State your full name.

4 THE WITNESS: Thomas Joseph Herrmann.

5 DIRECT EXAMINATION BY MR. LAVIGNE:

6 Q Are you currently serving a federal sentence?

7 A Yes, I am.

8 Q How long are you serving?

9 A 11 years.

10 Q What for?

11 A Bank robbery.

12 Q When were you convicted of this federal offense?

13 A May 13, 1971.

14 Q And when were you sentenced?

15 A September 27, 1971.

16 Q Have you been in federal custody since your
17 conviction?

18 A No, I haven't.

19 Q Where were you? Where else were you?

20 A State custody.

21 Q When were you convicted by the State Court?

22 A May 6, 1971.

23 Q And when were you sentenced by the State Court?

24 A May 6th, 1971.

25 THE COURT: What was the charge?

1 THE WITNESS: Narcotics violation.

2 THE COURT: What did it involve?

3 THE WITNESS: Sale of narcotics.

4 THE COURT: Heroin?

5 THE WITNESS: Yes.

6 THE COURT: What was your sentence?

7 THE WITNESS: Five to seven.

8 BY MR. LAVIGNE:

9 Q Whose custody were you in at the time that you were
10 sentenced and convicted in State Court?

11 A Federal custody.

12 Q When did you go to state custody?

13 A After I pleaded guilty to the federal charge,
14 May 13th.

15 THE COURT: Can counsel agree -- I would like
16 to have that specifically in the record -- can both
17 counsel agree upon that? Was this man in state
18 custody and brought over here on a habeas warrant,
19 ad testificandum? Or what were the facts there?
20 Can you both agree on that?

21 MR. CLARK: Your Honor, at the time of the
22 plea Mr. Herrmann was a federal prisoner. He was
23 being held since he did not make bond.

24 As soon as the plea was entered he was
25 immediately released on his own recognizances from

1 federal custody, and turned over to state
2 authorities, to commence service of the state
3 sentence.

4 THE COURT: How did he get sentenced in the
5 State Court? Was he brought over there on a writ?

6 MR. CLARK: He was taken to State Court by
7 writ, while the federal charge was pending, and
8 entered his plea, and was sentenced there at the
9 time he came in for plea here.

10 MR. LAVIGNE: We agree to that.

11 THE COURT: He was brought to the state on
12 what kind of a writ?

13 MR. CLARK: I really don't know the answer to
14 that, your Honor.

15 THE COURT: There was a recent case in the
16 Second Circuit, down in New York, concerning --
17 something of that nature. You gentlemen are
18 probably familiar with it.

19 MR. CLARK: I think it had to do with
20 interstate detainers.

21 THE COURT: That's correct. I was curious to
22 know what the relationship was here between these
23 two courts at that time. All right.

24 BY MR. LAVIGNE:

25 Q How did it happen that you went to state custody the

1 day you pleaded guilty in Federal Court?

2 A On my attorney's advice.

3 THE COURT: Who was your attorney, Mr.
4 Herrmann?

5 THE WITNESS: Mr. Spear.

6 THE COURT: Is he here today?

7 THE WITNESS: Yes, he is.

8 BY MR. LAVIGNE:

9 Q Why did you ask for such a transfer of custody?

10 A I believed that would make me eligible for
11 concurrent sentence.

12 Q Where did you first get this idea?

13 A I was first told by an inmate at the jail, and I
14 asked Mr. Spear about it. And Mr. Spear explained to me that
15 I had to commence service of my state sentence.

16 Q Can you remember exactly as possible what Mr. Spear
17 told you?

18 A The only way my time could run concurrent, if I
19 begin service of my state sentence.

20 Q Who else did you speak to about this?

21 A Spoke to Mr. Clark.

22 Q Where did you speak to him?

23 A The Marshal's Office, in New Haven.

24 Q Who else was present when you spoke to him?

25 A Mr. Spear.

1 Q What happened?

2 A I asked Mr. Clark if I could speak to him for a
3 moment, and he agreed. I asked him what he could do for me,
4 if he could do anything as far as helping me.

5 He told me he could not give any recommendation
6 concerning the amount of time I would get.

7 Q What did you say to him then?

8 A I told him what I was really concerned with was
9 being eligible for concurrent sentences. And I explained to
10 him that it was my understanding that I wasn't eligible the
11 way it was situated at the time, and that I had to begin
12 service of my state service in order to become eligible.

13 Q Were those the words that you used when you spoke
14 to him?

15 A Yes. And Mr. Clark agreed, and told me that was
16 correct.

17 Q Excuse me? Mr. Clark agreed to what?

18 A That I would become eligible for concurrent
19 sentencing if I commenced service of my state sentence.

20 THE COURT: He didn't say anything about
21 whether the judge making the sentence had anything
22 to do with that?

23 THE WITNESS: No, we were just talking about
24 becoming eligible for concurrent sentencing.

25 THE COURT: Only talking about eligibility?

1 THE WITNESS: Right.

2 THE COURT: There was no commitment or promise
3 on his part?

4 THE WITNESS: No, not as far as giving me,
5 you know, getting me a concurrent sentence. As far
6 as making me eligible.

7 THE COURT: Eligible?

8 BY MR. LAVIGNE:

9 Q So what agreement, if any, did you reach with the
10 prosecutor?

11 A That I would be released to state custody, which
12 would make me eligible for concurrent sentence. And Mr. Clark
13 wouldn't oppose concurrent sentence when I actually requested
14 it.

15 Q Which of these representations of the prosecutor
16 were carried out?

17 A Well, they were both carried out, but they didn't
18 make me eligible for concurrent sentence.

19 Q Did you rely upon being eligible for concurrent
20 sentence in your federal and state sentences, when you pleaded
21 guilty before the Court?

22 A Yes, I did.

23 Q When did you first learn that you were deprived of
24 eligibility for concurrent service by your transfer to state
25 custody, prior to disposition of your federal sentence?

1 A In the early part of 1975.

2 Q And what, if anything, did you do when you
3 discovered that?

4 THE COURT: Excuse me. So that it will be
5 clear to me, when you were here in court before me,
6 wasn't the question asked of you, or stated to you,
7 that it was to commence upon release from state
8 custody? Isn't that correct?

9 THE WITNESS: I knew I received a consecutive
10 sentence when I was sentenced.

11 THE COURT: That is my point.

12 THE WITNESS: Mr. Lavigne's question was when
13 did I become aware of the fact that I was never
14 eligible?

15 I thought all along that I was eligible; that
16 the prosecutor's agreement was fulfilled, and that
17 I was just unlucky in receiving a consecutive
18 sentence. I didn't realize I was never eligible
19 for the concurrent sentence.

20 BY MR. LAVIGNE:

21 Q What did you do then when you discovered in 1975
22 that you were never eligible for concurrent sentence?

23 A I wrote to my attorney, Alan Neigher.

24 Q What happened at that time?

25 A Well, he had an appeal before the Second Circuit at

1 the time, and he included that claim with the appeal.

2 Q Then you brought this up at the appeal level?

3 A Yes.

4 Q Did you have a co-defendant in the state and
5 federal proceedings?

6 A Yes, I did.

7 Q What was his name?

8 A George Buchanan.

9 Q Have you spoken to him since the time that you were
10 convicted?

11 A Yes, I have.

12 Q Do you know whether he is still in prison?

13 A No, he was released a year and a half ago.

14 Q He was released? How do you know that?

15 A Well, I was on a furlough last summer and he called
16 my house.

17 Q I see. And he told you at that time that he had
18 been released?

19 A That he was released, yes.

20 Q How is it that he has been released and you are
21 still in prison?

22 MR. CLARK: I object to that question, your
23 Honor. I'm not sure the witness is competent to
24 answer that.

25 MR. LAVIGNE: I'll withdraw the question.

1 No more questions.

2 THE COURT: Counselor, you may want to see the
3 probation report and have the advantage of review-
4 ing it, like co-counsel.

5 CROSS EXAMINATION BY MR. CLARK:

6 Q Mr. Herrmann, at the time that you had charges
7 pending here in Federal Court, you also had state charges
8 pending; is that correct?

9 A Yes.

10 Q Drug charges?

11 A Yes.

12 Q And do you recall who your attorney was on those
13 charges?

14 A Thomas Garrity.

15 Q Thomas Garrity?

16 A Yes.

17 Q Did you ever discuss with Mr. Garrity the question
18 of concurrent versus consecutive sentencing?

19 A I believe Mr. Spear worked out an arrangement with
20 Mr. Garrity to have me brought into court and sentenced on
21 those state charges, so I would be able to be released and
22 begin service.

23 Q To your knowledge you never discussed that
24 personally with him, then?

25 A He came over. Mr. Garrity visited me at the

1 Bridgeport Correctional Center and explained to me that he
2 spoke to Mr. Spear, and was going to have me brought to
3 court and sentenced on that charge; take care of that matter,
4 and this was supposed to make me -- it was one of the steps
5 toward making me eligible for concurrent sentence.

6 Q And do you know where Mr. Garrity obtained his
7 information that that would make you eligible for concurrent
8 sentence?

9 A I believe from Mr. Spear.

10 Q Do you recall when that conversation was?

11 A No, it was sometime in '71, prior to May 6th.

12 Q Would it have been a short time prior to the entry
13 of the guilty plea in the State Court?

14 A Yes.

15 Q Did the State Court at that time know that you had
16 federal charges pending?

17 A Yes, they did. I was sentenced concurrent to the
18 state charges.

19 Q Were you not in fact just given a straight sentence
20 in the state, with no mention made of whether it would be
21 concurrent or not with the federal sentence?

22 A I believe that it was made concurrent, didn't it?
23 Wasn't that automatically a concurrent sentence, if I remained
24 in federal custody?

25 Q The point of the matter, since it was not a federal

1 sentence at the time that you were sentenced in State Court--

2 A No, the Court was told that I was in federal
3 custody when I plead guilty and was sentenced, and that I
4 would -- and that I was facing the bank robbery charges.

5 Q However, you had not been sentenced by the
6 Federal Court, obviously, at that point?

7 A No.

8 Q So when you received your sentence from the State
9 Court, it was simply a term of years?

10 A Right.

11 Q Now, you also indicated that there was a conversa-
12 tion between yourself, and Mr. Spear, in which I participated,
13 from which you drew the conclusion that the only way you can
14 become eligible for concurrent sentencing was if you went to
15 the custody of the state officials?

16 A Yes.

17 Q Do you recall exactly how I phrased that?

18 A I don't believe that you phrased it. I think I was
19 the one who phrased it, and you agreed with me.

20 Q All right. Would it have been something to the
21 effect that if in fact you were in state custody the
22 sentences could be made concurrent by the judge designating
23 the state institution as the place of your service of the
24 federal sentence?

25 A No, I don't believe that was -- all that was told

1 was that I had to commence service of my state sentence to
2 make me eligible for concurrent sentences.

3 Q That is your recollection of the conversation?

4 A Yes.

5 Q And you stated that you in fact relied on that?

6 A Yes, I did. It was the only thing that I had to
7 base my plea on.

8 Q Now, when you came to Federal Court to be sentenced
9 here, do you recall listening to your attorney, Mr. Spear,
10 speak on your behalf at sentencing?

11 A Yes.

12 Q And he asked that the sentence be concurrent; isn't
13 that correct?

14 A Yes.

15 Q And you also asked that they be concurrent; isn't
16 that correct?

17 A Yes.

18 Q And you were fully aware that they could have been
19 consecutive, had the judge so ordered; isn't that correct?

20 A Yes.

21 Q So that when you entered your plea you were fully
22 aware that your sentence could have been up to 20 years in
23 this court, consecutive to whatever the state had given you?

24 A Yes, but I wasn't aware of the fact that I was
25 ineligible for concurrent sentence.

1 Q Were you aware that the judge could designate
2 where you would serve your sentence?

3 A The judge could not designate where.

4 Q Are you aware that the judge could make a
5 recommendation?

6 A I was aware -- I could have also recommended it.

7 Q I am just asking for a simple yes or no answer as
8 to whether you were aware of that or not.

9 A Yes, I was aware of it.

10 Q And you testified that you were fully aware that
11 you could have received a consecutive sentence, but you felt
12 that you were just unlucky that you had received that, as
13 opposed to a concurrent sentence?

14 A Yes.

15 Q Also, after you were sentenced you filed several
16 motions for reduction of sentence and modification of
17 sentence, and Mr. Neigher filed motions on your behalf with
18 respect to information in the presentence report, and so
19 forth? You are aware of all of those motions?

20 A Yes, I am.

21 Q Did you ever mention at any time in any of those
22 motions the conversation that you and I had that induced you
23 to enter a plea?

24 A No, I didn't. I was not aware at that time that I
25 was never eligible for the concurrent sentencing. I didn't

1 become aware of that until the early part of 1975.

2 Q Do you recall when the first time is that you
3 indicated, either in a letter to myself, or in a particular
4 file in court, that there had been a conversation between
5 myself and you and your attorney?

6 A I believe that was in -- around the summer of 1975.

7 Q Of 1975?

8 A Oh, to yourself?

9 Q Yes.

10 A I believe that was in the fall of 1975. I also
11 wrote a letter to Judge Clarie at that time.

12 Q And that was after your appeal was denied, was it
13 not, in the Second Circuit?

14 A Yes.

15 Q Is that correct?

16 A Yes.

17 MR. CLARK: I have no further questions.

18 THE COURT: Any other questions, Counselor?

19 MR. WIZNER: Let me try one, your Honor.

20 REDIRECT EXAMINATION BY MR. WIZNER:

21 Q Do you know what happened to your co-defendant,
22 Mr. Buchanan?

23 A Yes, I do.

24 Q How do you know?

25 A Because I spoke with him.

1 Q And when did you speak with him?

2 A In the summer of 1975.

3 Q And do you recall in words or substance, that
4 conversation?

5 A Yes, I asked him, because I believed he was going
6 to have to come to Somers and finish up his sentence there,
7 and I asked him why he didn't have to. He told me because
8 he stayed in federal custody, that his time automatically run
9 concurrent with his state time -- ran concurrent with the
10 federal time.

11 Q So Mr. Buchanan was released on federal parole
12 last year?

13 A Yes.

14 MR. WIZNER: Thank you.

15 Nothing further, your Honor.

16 THE COURT: How much time did you serve in
17 state custody, Mr. Herrmann?

18 THE WITNESS: Almost four years.

19 THE COURT: That is on the narcotics charge?

20 THE WITNESS: Yes.

21 THE COURT: When were you released from state
22 custody?

23 THE WITNESS: January 1975.

24 THE COURT: And how long had you been in
25 federal custody?

1 THE WITNESS: Since January 5th, I believe,
2 1975.

3 THE COURT: And do you know the prior
4 criminal record of Buchanan?

5 THE WITNESS: I'm somewhat familiar with it,
6 your Honor.

7 THE COURT: Is his record much different than
8 yours?

9 THE WITNESS: I don't believe so, your Honor.

10 THE COURT: May I see that, Madame Clerk,
11 please, that probation report again, please?

12 According to this, as you know, I mentioned in
13 court when you were here, way back when you were
14 16 years of age, your adult record, breaking and
15 entering, two counts in Stamford, in '59. In '59,
16 theft, nollled. In '62, disorderly conduct,
17 \$25 fine. In '63, burglary, New Jersey, nine
18 months, suspended, two years' probation, \$150, to
19 be paid at the rate of \$3 a week.

20 It says here in this report that the
21 defendant and two other men riding in New Jersey
22 picked up an 18 year old hitch-hiker, and began
23 to abuse him, and finally stopped the car, got out
24 and began slapping the young hitch-hiker, who
25 offered them money to leave him alone, and took

1 \$12 out of the victim's wallet, and threw the
2 wallet back to him and left him lying on the
3 ground, and rode away.

4 When he came to trial the charge of robbery
5 was dismissed, and the defendant entered a plea of
6 guilty to larceny.

7 Then it goes on, in '64, trespassing,
8 Greenwich, \$50 fine. '64, manslaughter, sentenced
9 to Connecticut State Prison, one to three years.
10 Appealed, and the appeal was denied.

11 '64, false statement to the FBI, one year,
12 suspended after 30 days.

13 In '69, attempted breaking and entering,
14 two to four years.

15 '70, sale of narcotics, two to five years
16 on first count; five to seven on second count,
17 to run concurrent.

18 '71, probation was revoked; sentence of two to
19 four years imposed, concurrent with above sentence.

20 So, you were quite familiar with concurrent
21 sentences and consecutive sentences, weren't you,
22 with that background?

23 THE WITNESS: Not in respect to the federal
24 sentence and the state sentence, and the way they
25 run concurrently, what has to be done to make them

1 concurrent or consecutive.

2 THE COURT: When you were before this Court
3 didn't the Court inquire of you "Has there been
4 any promise or any agreement made to you prior to
5 your entering a plea here today?" Or words to
6 that effect? Wasn't that asked of you?

7 THE WITNESS: Yes, you did.

8 THE COURT: What did you say?

9 THE WITNESS: No, there wasn't.

10 THE COURT: So, in other words you had no
11 representation to make to the Court that "I'm
12 pleading guilty because the prosecutor said that
13 I'd get a concurrent sentence, rather than
14 consecutive"?

15 THE WITNESS: The prosecutor didn't say he
16 was going to give me a concurrent sentence; he said
17 he's release me to begin my state sentence, so I'd
18 be eligible for concurrent sentence. At that time
19 I was already under a concurrent sentence, and I
20 didn't realize it.

21 THE COURT: How much more time have you got
22 in the federal jurisdiction before you are eligible
23 for parole now, do you know?

24 THE WITNESS: Well, I have about better than
25 a year left before I become eligible. But, in

1 reality, I have nearly three years left, because
2 of the guidelines. My guidelines call for 60 to
3 72 months. I won't really become eligible until
4 1980.

5 THE COURT: That is because of your past
6 record, that the guidelines are high?

7 THE WITNESS: To some degree, yes. Also, they
8 came out with new guidelines this year, that raised
9 my severity, because I have been divorced recently,
10 and they no longer give me credit for my high
11 school diploma.

12 MR. WIZNER: He lost a point for being
13 divorced and lost a point for the high school
14 equivalency, because the new guidelines are stated
15 to get the high school diploma in prison. You
16 don't get a point for high school graduation. So
17 he lost two points.

18 The point is, had he stayed in federal custody
19 he still would have had 60 to 72 months, which is
20 five years, and still would be eligible for federal
21 parole, because the state sentence --

22 THE WITNESS: Excuse me. If I stayed in
23 federal custody I would have fallen into 45 to 55,
24 because the guidelines just recently changed.

25 THE COURT: Going by the old guidelines --

1 THE WITNESS: Going by the old guidelines, if
2 I had stayed in federal custody I would go up for
3 parole a couple of years ago. So I would have
4 come under it.

5 MR. WIZNER: There is a state case, State
6 versus Redway, which holds unless the State Court
7 Judge expressly states to the contrary, State
8 sentence automatically runs concurrently with any
9 other federal sentence.

10 THE COURT: You see, one of the things that
11 appears to concern the Court about your case,
12 Mr. Herrmann, as I recall -- and I will have to
13 refresh my recollection again by rereading it --
14 it seems to me you were the fellow that had the
15 gun, according to the evidence; isn't that right?

16 THE WITNESS: Yes, your Honor.

17 THE COURT: But you claim the gun wasn't
18 loaded. I don't know whether it was loaded or not;
19 I wasn't there.

20 You take that, along with the fact that this
21 other incident here, of shooting a man, and killing
22 him -- it says the defendant was held criminally
23 responsible for the fatal shooting of a 21 year
24 old man, Bruce Marco, who had come to the
25 defendant's apartment with his friend,

1 George Buchanan -- the same fellow you were in the
2 bank robbery with and charged with the narcotics
3 transaction.

4 THE WITNESS: Excuse me, your Honor. I
5 believe we testified to that last year, and that
6 wasn't a narcotics transaction. The Court ruled
7 it wasn't a narcotics transaction. They were
8 breaking into my house, and the judge felt that I
9 failed to inquire into their identity, and to take
10 that precaution, to establish their intent. But
11 the Court did rule that they were breaking into my
12 house at the time.

13 THE COURT: Well, I wasn't there. All I know
14 is what it said here in this report. A man was
15 shot, and a man was killed.

16 Then, let me see if I can read the rest of it:
17 Defendant, Herrmann, told the police that men had
18 broken into the front door of his apartment, into
19 the home, into the livingroom. He said he got out
20 of bed and took a gun with him to investigate.
21 He admitted knowing the two men. Defendant
22 Herrmann told police he did not recognize them at
23 first, and began shooting.

24 So, that is consistent with your present
25 statement, that you didn't know who it was, right?

1 THE WITNESS: Yes.

2 THE COURT: One of the men was Buchanan, was
3 that right?

4 THE WITNESS: Yes, it was.

5 THE COURT: And Buchanan was with you at the
6 time you held up the bank?

7 THE WITNESS: Yes, he was. You see, your
8 Honor, Buchanan was addicted to drugs at the time.
9 At that time I was not addicted to drugs, but
10 later in life I became addicted to narcotics.

11 THE COURT: It is a sad thing: you make a
12 nice appearance as a person, as a witness here on
13 the witness stand, but you look at your record,
14 and you wonder what this fellow has been into all
15 his life.

16 You make a nice appearance, and you speak well;
17 you have got great possibilities in life, to become
18 straight.

19 Your father was a retired Stamford police
20 officer; your mother is at the hospital, as a
21 practical nurse, helping others, apparently. In
22 that respect it is rather a sad circumstance.

23 All right, thank you.

24 (Witness excused.)

25 THE COURT: Any other witnesses, Counselor?

1 MR. LAVIGNE: One other witness.

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4
5 E. EUGENE SPEAR, appearing
6 as a witness, being duly sworn, testified as follows:

7 THE CLERK: Would you state your full name?

8 THE WITNESS: E. Eugene Spear.

9 THE CLERK: Your address, Mr. Spear?

10 THE WITNESS: 139 Tremont Avenue, Bridgeport,
11 Connecticut.

12 DIRECT EXAMINATION BY MR. LAVIGNE:

13 Q Mr. Spear, what is your occupation?

14 A Attorney.

15 Q And have you practiced in Federal Court?

16 A Yes, I have. I am admitted to practice. I am
17 presently practicing only in State Courts, as a public
18 defender.

19 Q How were you assigned to defend Thomas Herrmann?

20 A I was a member of the panel set up to represent
21 indigents at that time.

22 Q Do you remember that Mr. Herrmann was released to
23 state custody following his guilty plea?

24 A Yes, that's correct.

25 Q Who requested this change of custody?

1 A I requested it.

2 Q Why did you request this change of custody to the
3 state?

4 A Well, as I recall -- and I reviewed my file and
5 the transcripts -- Mr. Herrmann's main concern was that he
6 would have an opportunity to at least try for a concurrent
7 sentence. He, in essence, admitted his guilt, and legally
8 there were no defenses. So, this was his primary concern,
9 and I remember that specifically.

10 He was in federal custody; he had narcotics
11 charges pending. And although I don't remember the specifics
12 of my conversation with his lawyer, Mr. Garrity, on the
13 state charges, I know we did talk. And it was by arrangement
14 that he pleaded guilty to the state charges first.

15 I know I discussed with Mr. Garrity how we could
16 arrange to have a shot at concurrent sentences. And in
17 discussing it with the Assistant U.S. Attorney, Mr. Clark --
18 I don't know who raised the question, but I am positive we
19 had a discussion. And it seemed to be generally agreed that
20 this should be the sequence.

21 In other words, he should be sentenced in the State
22 Court, then sentenced here. I would make an argument for a
23 concurrent sentence.

24 As I recall, and again I don't recall the specifics
25 of the conversation, I believe Mr. Clark indicated he would

1 not oppose a request for concurrent sentences, and that he
2 would not oppose Mr. Herrmann being released to state
3 custody, after the change of plea.

4 Q Do you know, did Mr. Herrmann speak to you about
5 his belief as regards concurrent sentencing?

6 A Yes, he did. That was his primary concern, as I
7 recall.

8 Q That's right. And did he state to you that it was
9 his belief that he had to be transferred into state custody
10 in order to be eligible for concurrent service in federal
11 and state sentences?

12 A I believe he did. Whether he indicated that was
13 as the result of some information he had picked up at the
14 jailhouse, so to speak, or in what concept, I don't recall.
15 But, he did. Yes, he did mention that, that that was his
16 belief and his understanding.

17 THE COURT: What did he say his understanding
18 was again, Counselor?

19 THE WITNESS: Well, he was under the
20 impression that he had to begin the state sentence
21 in order to have a chance at being eligible for
22 concurrent federal sentence.

23 How he came under that belief, I'm not sure
24 when he initially mentioned it to me. But he did
25 indicate that was his understanding.

1 BY MR. LAVIGNE:

2 Q Were you present at the Marshal's Office when
3 Mr. Herrmann spoke with the prosecutor?

4 A I recall -- and again, it has been a long time --
5 but I recall being here, and I am pretty sure there was a
6 conversation in which this was discussed, and Mr. Clark was
7 there, along with Mr. Herrmann and myself.

8 Again, I can't recall the specifics of the
9 conversation. I recall we were here in this building, and
10 went into the Marshal's Office to discuss this matter.

11 Q Finally then, was it your recollection -- is it your
12 recollection that petitioner Herrmann's main intention in
13 pleading guilty and requesting a transfer, was the belief
14 that he would be eligible -- be more eligible for concurrent
15 sentencing?

16 MR. CLARK: I object. He is asking the witness
17 to state the frame of mind of Mr. Herrmann.

18 THE COURT: Rephrase that, Counselor.

19 MR. LAVIGNE: I will rephrase the question.

20 THE COURT: If he made any representations --
21 the objection is sustained as to your question.
22 Why don't you rephrase that, and ask him what his
23 knowledge is, as to his conversation with the
24 defendant? And let him tell you.

25 What did you tell the defendant? What did you

1 tell Mr. Herrmann?

2 THE WITNESS: Is that a question from your
3 Honor?

4 THE COURT: Yes, just to bring it to a head.
5 What did you tell him? You were advising him.

6 THE WITNESS: Yes, I told him he would be
7 eligible for concurrent sentences if he started
8 his state sentence first. I did tell him that.

9 BY MR. LAVIGNE:

10 Q Do you know why Mr. Herrmann requested the change
11 of custody?

12 A For the reasons I stated. He wanted to have an
13 opportunity to argue for concurrent sentences. And he was
14 under the impression that this was mechanically the way to do
15 it. And I was under the same impression, as I advised him to
16 do this.

17 MR. LAVIGNE: Thank you. No more questions.

18 CROSS EXAMINATION BY MR. CLARK:

19 Q Good afternoon, Mr. Spear.

20 A Good afternoon.

21 Q You stated, I believe, that one of Mr. Herrmann's
22 primary considerations at the time of the plea was whether
23 the state and federal sentences could be concurrent; is that
24 correct?

25 A Yes.

1 Q And do you recall at the time of the plea whether
2 that fact had been previously discussed with me, before the
3 day of the plea?

4 A I believe it had been. As I said, I don't have
5 specific recall of what was said in this conversation. But
6 I believe it had been, because I remember I talked with
7 Mr. Garrity, who represented him on the state charges. And
8 it seems as though everything happened fairly quickly after
9 that. He was sentenced in State Court, and the following
10 week I believe he changed his plea in this court.

11 Q Now, do you recall if in fact on the day that
12 Mr. Herrmann came here to change his plea that I had no
13 knowledge of that until he appeared in Federal Court?

14 A You had no knowledge that he pleaded --

15 Q In the State Court?

16 A That may well be so.

17 Q So you have, in other words, no specific
18 recollection that either you or Mr. Garrity, or anyone, had
19 called to advise me that Mr. Herrmann was going to enter a
20 plea in the State Court?

21 A May I just look through my file, if I might?

22 Well, I don't believe I advised you. Whether or
23 not you were advised, I don't know.

24 Q So far as you know, you didn't?

25 A No, I didn't.

1 Q Prior to the day that Mr. Herrmann came to Federal
2 Court here?

3 A Correct.

4 Q Because that was not your case; it was being
5 handled by Mr. Garrity; is that correct?

6 A True. Yes, I was aware of the case, but I wasn't
7 representing him.

8 Q All right. Now also you stated that you have a
9 recollection of more or less of a three-way conference
10 between yourself and myself and Mr. Herrmann, in which it was
11 generally agreed that Mr. Herrmann would have to be released
12 to state custody in order to be eligible for concurrent
13 sentencing; is that correct?

14 A Yes.

15 Q But you don't have a specific recollection of my
16 advising you along those specific terms, do you?

17 A No. As I said, I don't have a specific recall of
18 exactly what was said, no.

19 Q Before Mr. Herrmann entered his plea, however, I
20 take it that you did make it perfectly clear to him that it
21 was likely, and in fact possible that he could receive a
22 consecutive sentence?

23 A Yes, I told him that.

24 Q He was well aware of that?

25 A Well, he was aware that the Court could impose a

1 consecutive sentence, yes.

2 Q And in your discussions with him did he state that
3 he would take his chances on getting a consecutive sentence,
4 and that he just wanted to wrap it all up between the state
5 and the Federal Government at that point?

6 A Well, he knew he was taking a chance -- taking
7 his chances, so to speak, because of his record. He knew
8 that a consecutive sentence could well be imposed.

9 However, again, he certainly did not know, and I
10 did not tell him, that this was a legal impossibility.

11 Q Did you ever discuss with him as to whether the
12 state institution could be designated as the place of
13 incarceration?

14 A Well, as I recall it, that was the basis on which
15 I gave him my advice.

16 Q All right. In other words, you were under the
17 impression that it could be made concurrent by the judge
18 saying that he recommends to the Attorney General that the
19 state institution be designated as the place of confinement;
20 is that correct?

21 A Yes, I was under that impression, yes.

22 Q And can you recall also, when you spoke on
23 Mr. Herrmann's behalf, at the time of disposition -- now
24 showing you a transcript of that to refresh your recollection --
25 do you recall also saying that you understood that the

1 U.S. Attorney has the power to place a convicted person in a
2 state institution?

3 A Well, it is in the transcript. I assume I must
4 have said that. As I said, I don't have a recall right now
5 of the exact words. But, I take it that I said that.

6 Q When you said that weren't you really indicating
7 that someone has the authority to designate where the
8 service -- where the sentence should be served, whether it
9 be the Attorney General, or the judge, or someone in that
10 category?

11 A Yes.

12 Q So that based on your advice Mr. Herrmann then was
13 aware that he could have received a consecutive sentence,
14 and it could have been up to 20 years, which is the maximum
15 for the statute; and that whether it was consecutive or
16 concurrent, that depended on where the judge designated as the
17 place of confinement? Is that essentially correct?

18 A Well, that's essentially what I advised him. I
19 assume that is the way he understood it.

20 MR. CLARK: Thank you. I have no further
21 questions.

22 MR. LAVIGNE: No further questions, your Honor.

23 THE COURT: Just one question --

24 THE WITNESS: I'm sorry, your Honor.

25 THE COURT: That's all right; I was thinking --

1 I should have thought a little quicker.

2 When were you first advised that there was
3 any alleged misunderstanding on the part of your
4 client?

5 THE WITNESS: Frankly, if I can just look at
6 my file -- that was in 1975, I'm sure, your Honor.

7 Mr. Herrmann, I believe, wrote -- yes,
8 Mr. Herrmann wrote me a letter -- I'm sorry, your
9 Honor, prior to Mr. Herrmann writing me a letter
10 Attorney Alan Neigher contacted me by telephone,
11 or I happened to see him in court. And sometime
12 thereafter, in '75, I received a letter, I believe
13 in the fall, from Mr. Herrmann, as well.

14 THE COURT: And when you appeared with your
15 client in the Federal Court the first time,
16 Mr. Spear, had he already plead in the State Court
17 at that time?

18 THE WITNESS: When he pleaded guilty.

19 THE COURT: Where did he plead guilty first,
20 in the State Court or the Federal Court?

21 THE WITNESS: The State Court.

22 THE COURT: Then he came and plead in here,
23 afterwards?

24 THE WITNESS: Yes, your Honor.

25 THE COURT: Then he went back for

1 resentencing in the State Court, and then came back
2 here to be sentenced in the Federal Court? Is that
3 the way it worked?

4 THE WITNESS: No, he was sentenced on the
5 same date that he plead in the State Court, as far
6 as I recall.

7 THE COURT: All right. Who represented him
8 in State Court?

9 THE WITNESS: Thomas Garrity.

10 THE COURT: Where is he from?

11 THE WITNESS: Bridgeport.

12 THE COURT: Bridgeport?

13 THE WITNESS: Yes.

14 THE COURT: All right, thank you.

15 (Witness excused.)

16 THE COURT: Any other witnesses, Counselor?

17 MR. LAVIGNE: No, your Honor, no further
18 witnesses.

19 MR. CLARK: No witnesses for the Government.

20 I have a representation, or a statement that
21 I can make to the Court, if counsel would be
22 interested in cross examining on that basis -- I
23 could take the stand.

24 If they would have no questions, perhaps I can
25 make a representation to the Court. I do have

1 Mr. Pickerstein with me, who could put me on the
2 stand.

3 THE COURT: I suppose if you are going to
4 testify and make a representation, it would be
5 better that you should be under oath, and there
6 won't be any claim by the petitioner that you were
7 given a special privilege that he wasn't.

8 MR. WIZNER: If your Honor, we have always
9 found Mr. Clark to be a truthful person, and we
10 will accept his representations. Whether or not
11 his recollections are correct is another question.

12 THE COURT: Maybe your client wouldn't agree,
13 Counselor.

14 MR. WIZNER: He agrees.

15 THE COURT: All right, it is your case,
16 gentlemen.

17 MR. WIZNER: We appreciate that, your Honor,
18 thank you.

19 MR. CLARK: I would state for the record that,
20 first of all, with respect to Mr. Herrmann's
21 state charges, I was not aware of the plea and
22 sentence in the State Court until Mr. Herrmann
23 arrived in Federal Court on the date that he
24 entered his guilty plea here.

25 There was a discussion, the exact details of

1 which I cannot recall in their full scope.

2 THE COURT: How about the conversation that
3 he alluded to, when you and Mr. Spear and he were
4 present in New Haven?

5 MR. CLARK: That was in Hartford here.

6 THE COURT: In the Marshal's Office?

7 MR. CLARK: Yes.

8 THE COURT: All right.

9 MR. CLARK: That I recall, that, as they
10 stated, first of all I recall that I advised him
11 that the sentence could be made concurrent if in
12 fact the Court designated or recommended that the
13 Attorney General designate the state institution
14 as the place of confinement. And that, I believe,
15 is the way the statute is worded.

16 I also stated that I would not object to
17 Mr. Spear asking that your Honor do that. And I
18 made clear at that time that there was no
19 commitment that I was promising, but that simply
20 I would not object if Mr. Spear asked for that.

21 So, my recollection of the conversation is
22 that I advised him exactly as the statute was
23 worded, and simply stated I would not object to
24 any efforts he made to convince your Honor to make
25 the sentence concurrent, by designating the

1 institution.

2 I have no further recollection of the
3 conference.

4 If Mr. Wizner has any questions, I will be
5 happy to answer.

6 MR. WIZNER: We accept Mr. Clark's
7 representation that that is his best recollection
8 of what happened.

9 THE COURT: One question of Mr. Herrmann --
10 you can answer it right there, Mr. Herrmann: Did
11 anyone else, such as the Probation Officer, make
12 any representation to you concerning this subject
13 matter?

14 MR. HERRMANN: No, your Honor.

15 THE COURT: Thank you.

16 Does counsel want to be heard further on
17 argument, or do you want to file a brief?

18 MR. WIZNER: We would ask for one week, your
19 Honor, to file a supplementary memorandum. We
20 have already filed one brief. In view of today's
21 testimony we would like the opportunity to file an
22 additional one.

23 THE COURT: Does counsel want to argue the
24 matter here in court further, at this time, or not?

25 MR. WIZNER: If your Honor please, we would

1 prefer to reduce our argument to writing.

2 THE COURT: I didn't want to deprive your
3 colleague of the experience, if he would like to
4 argue it. I will be glad to sit here and hear it.

5 MR. WIZNER: He made his pitch before he put
6 on his witnesses, your Honor. Thank you.

7 THE COURT: Counselor, do you have anything
8 to add?

9 MR. CLARK: No, I don't, your Honor.

10 THE COURT: Do you want an opportunity to
11 reply to their memorandum?

12 MR. CLARK: Yes, I do. I request a week after
13 theirs is in.

14 THE COURT: Mr. Herrmann, is there anything
15 you want to add that your counsel hasn't brought
16 up, that you have thought of? And you might want
17 to think of it, if it hasn't been covered.

18 MR. HERRMANN: No, your Honor. I would like
19 to have a bond set.

20 THE COURT: You would like to have a bond set?

21 MR. HERRMANN: Yes.

22 THE COURT: For what purpose?

23 MR. HERRMANN: For the holidays, to go home.

24 THE COURT: Well, once the sentence has
25 started, unless there are most unusual circumstances,

1 the Court would not set a bond. So that motion is
2 denied.

3 Anything else you have in mind?

4 MR. HERRMANN: No.

5 THE COURT: Very well. The Court will
6 withhold any action on the matter until the Court
7 has reviewed your briefs.

8 Nothing further at this time, adjourn court,
9 Mr. Bailiff.

10 (Whereupon the hearing was concluded.)
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I N D E X

1				
2	<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>
3	Thomas Joseph Herrmann	12	20	25
4	E. Eugene Spear	34	38	
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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF CONNECTICUT

3 * * * * *

4 THOMAS JOSEPH HERRMANN

5 vs.

6 UNITED STATES OF AMERICA

7 * * * * *

CIVIL ACTION

NO. H-76-361

NOVEMBER 22, 1976

8 COURT REPORTER'S TRANSCRIPT CERTIFICATE

9 I hereby certify that the foregoing is a
10 true and correct transcript of my stenographic notes,
11 reduced to typewriting under my direction.
12
13

14 Official Court Reporter
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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
JAN 20 4 54 PM '77

CLERK
U.S. DISTRICT COURT
HARTFORD, CONN.

THOMAS JOSEPH HERRMANN

-vs-

UNITED STATES OF AMERICA

Civil No. H-76-361

RULING ON MOTION O
VACATE JUDGMENT

The petitioner, Thomas J. Herrmann, is a federal prisoner, serving his sentence on a federal charge of armed bank robbery at the Connecticut Correctional Institution in Enfield, Connecticut. He pled guilty to a violation of 18 U.S.C. § 2113(a) on May 13, 1971 and was sentenced on September 27, 1971, to a term of eleven (11) years imprisonment, with the specific provision, that said federal sentence would run consecutive to the term of 5 - 7 years imposed by Judge Tierney in the State Court on May 7, 1971, for the sale of narcotics. (Tr. 6, Sept. 27, 1971). Immediately after his federal plea, his attorney requested that he be released to state custody, so that he could commence serving his state sentence. His counsel did this believing that his client might be eligible to receive a federal sentence, which would run concurrently with his state sentence.

On May 11, 1971, Herrmann's accomplice, George B. Buchanan, pled guilty to the same federal charge and was sentenced on July 26, 1971 (Zampano, J.) to serve a term of eleven (11) years. When Herrmann was subsequently sentenced

by the undersigned, the Court expressly stated, that it had seriously considered sentencing him to a term between 12 to 15 years, because he was the robber who was armed and threatened the bank employees. Furthermore, his prior criminal record disclosed that he had been convicted of manslaughter on March 16, 1964 for shooting and killing one Bruno DeMarco, aged 21 years, while the latter was allegedly breaking into the defendant's apartment. Herrmann admitted knowing the two men involved, but did not recognize them at first and began shooting. This Court considered that here was a man who had proven his propensity to use a gun when the circumstances required and was carrying a weapon during the commission of the bank robbery, although he later represented the gun was not loaded. Of the two defendants, certainly he was the more serious criminal offender.^{1/}

The petitioner would now make much of the fact, that Buchanan has now completed his prison sentence. He asserts that the Court, when rationalizing a lowering of Herrmann's sentence to 11 years from 12 to 15 years then being considered, made reference to the fact that both defendants should be treated the same. While the Court did in fact treat them the same, for the purpose of punishment on the sentence for the federal crime, Herrmann had still pending the balance of a 5 to 7 year state sentence for the sale of heroin, while his accomplice, Buchanan, had only a one-year parole sentence

pending. This circumstance would obviously account for Herrmann's differential in overall time to be served. The Court did not indicate at the time of sentencing that it was considering both the state and federal sentences of Herrmann and Buchanan. Rather it did state its intention to treat them the same, insofar as the federal crime was concerned. In being treated the same as Buchanan on the term of the federal sentence, Herrmann was treated fairly and equally and his sentence was just and proper.

When Herrmann appealed a prior § 2255 ruling of this Court, United States v. Herrmann, 524 F.2d 1103, 1104 (2d Cir. 1975), he attempted to raise a Rule 11 Fed. R. Crim. P. claim, that he had not been advised before accepting his guilty plea, that the Court was powerless to make a federal sentence run concurrently with a state sentence previously imposed on an unrelated matter. Since this issue had not been raised and passed upon by the District Court, the Circuit Court held that it could not be raised for the first time on appeal. Thus the petitioner has again filed this petition to comply with the Appellate Court's procedural ruling.

His complaint basically is that the sentencing court failed to advise him, that it had no statutory power to order a concurrent running of his federal sentence with his already imposed state sentence before accepting his guilty plea. He claims that his counsel and the prosecutor led him to believe

that the federal court did have such authority, although he does concede that neither his own counsel or the prosecutor ever promised or represented to him, that the Court would order a concurrent sentence nor did either represent to him what sentence the Court would ultimately impose. More specifically, he complains that since 18 U.S.C. § 3568^{2/} leaves a federal judge without specific authority to impose a federal sentence to run concurrently with a prior state sentence, the impact of that statute must be made known to the defendant when he pleads, in order that he fully understands the "consequences of his plea." Rule, Fed. R. Crim. P.

Prior to the acceptance of his guilty plea in open Court, the petitioner was questioned as to his awareness of what the maximum penalty could be and he acknowledged that it could be a maximum of 20 years' imprisonment and/or a \$5,000 fine. The 11-year sentence which was imposed consecutive to his completion of the 5 - 7 year state sentence, was well within the maximum sentence which could be lawfully imposed.

At the time of sentencing, the petitioner's counsel argued to the Court, as did the petitioner, that any federal sentence should run concurrently with the sentence on the state narcotics charge. In other words, he was asking the Court to impose a sentence that would consolidate the commission of two serious crimes for the discounted penalty of

one. Certainly his counsel realized, as did the petitioner, that the Court could exercise its discretion in making the sentence either concurrent or consecutive.

Title 18 U.S.C. § 4082 provides:

"(a) A person convicted of an offense against the United States shall be committed, for such term of imprisonment as the court may direct, to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served.

"(b) The Attorney General may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise, and whether within or without the judicial district in which the person was convicted, and may at any time transfer a person from one place of confinement to another."

When a federal court orders its sentence to run concurrently with a state sentence, compliance with such order is impossible, unless the Director of the Bureau of Prisons^{3/} (as the Attorney General's authorized representative) designates the particular state institution in which the state sentence is being served.

"It is no secret that our district courts on occasion direct (in so many words) concurrent service of federal sentences with state sentences. Neither is it a secret that such commands are honored. Why, and how? The answer is found in what may be termed 'administrative courtesy,' in that the Director of the Bureau of Prisons almost without exception designates the appropriate state institution when, and only when, the sentence specifically orders concurrent service with a state sentence." Looking at the Law, A. E. Gottshall, Attorney, Criminal Division, Department of Justice, in 16 Federal Probation 2, at 33 (June, 1952).

The Third Circuit has recently recognized that the District Court, while having no authority to designate a place of confinement, does have the right to impose a concurrent federal sentence with a previously imposed state sentence.

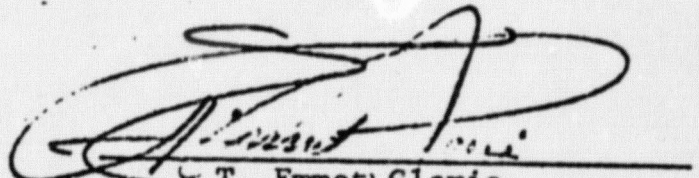
"We note that where a defendant, convicted of an offense against the United States pursuant to Title 18, comes before the district court for sentencing, having previously been sentenced for a state crime and being in state custody, the district court may recommend to the Attorney General that any federal sentence of confinement imposed and made concurrent with the state sentence shall be served in the state institution where such defendant has been confined by the state authorities." United States v. Janiec, 505 F.2d 983, 987 (3d Cir. 1974) (Footnote omitted).

Federal courts have always exercised the inherent judicial right and the discretion to impose concurrent federal sentences, where prior state sentences were currently being served by a defendant in a state institution.^{4/} This principle was recognized by the Court here, except that the Court found that the petitioner's prior criminal record was so serious, that in this instance justice required that a consecutive sentence should be imposed; and this is what the Court did. The petitioner has suffered no injustice nor has he been subjected to an unlawful sentence.

The Court finds after a full hearing that the petitioner's guilty plea was knowingly made with full knowledge

of the consequences as required by Rule 11, Fed. R. Crim. P. The Court further finds that he was not misled by any incompetent or false representations of his counsel or the assistant district attorney handling the case. The petitioner's motion to vacate judgment pursuant to 28 U.S.C. § 2255 is accordingly denied. SO ORDERED.

Dated at Hartford, Connecticut, this 17th day of January, 1977.



T. Emmet Clarie
Chief Judge

FOOTNOTES

1/ The defendant's Probation Report included the following:

	<u>"Offense</u>	<u>Place</u>	<u>Disposition</u>
3-25-59 (Age 16)	Breaking and entering, 2 counts	Stamford, Conn.	Referred to Juvenile Court.
11-18-59	Theft	Stamford, Conn.	Nolle.
10-16-62	Disorderly conduct	Stamford, Conn.	\$25 fine.
5-8-63	Larceny	Bergen County, N.J.	9 months suspended, 2 years probation; \$150 fine to be paid at the rate of \$3 per week.
. . . .			
11-13-64	Trespassing	Greenwich, Conn.	\$50 fine.
3-16-64	Manslaughter	Stamford, Conn.	On 2-5-65, sentenced to Connecticut State Prison to 1 year & 1 day, to 3 years. Appealed and denied on 10-15-65.
4-8-64	False statement to FBI	U.S. District Court, New Haven, Conn.	1 year, suspended after 30 days, 2 years probation.
5-26-69	Attempted breaking and entering	Stamford, Conn.	1-30-70, 2 to 4 years suspended, 2 years probation.
. . . .			
5-12-70	Sale of narcotics, 2 counts	Stamford, Conn.	On 5-5-71, Ct. 1 - CSP 2 to 5 years; Ct. 2 - CSP 5 to 7 years, to run concurrent.

Footnotes cont'd:

5-7-71 Probation viola- Bridgeport, Conn. Probation revoked
tion and sentence of
2 to 4 years CSP
imposed, to run
concurrent with
above sentence."

2/ 18 U.S.C. § 3568 provides in part:

"The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary"

3/ This authority has been designated to the Bureau of Prisons under 28 C.F.R. § 0.96.

4/ See Bureau of Prisons Policy Statement No. 1100.24 (August 28, 1974).